90-693 (1)

No. ________

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR CERTIORARI

*W. THOMAS GILMAN
EDWARD J. NAZAR
THOMAS E. MALONE
MARTIN R. UFFORD
J. FRANCIS HESSE
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A. QUESTION PRESENTED FOR REVIEW

Do the terms "debt" and "claim" as defined at 11 U.S.C. §101(11) and 11 U.S.C. §101(4), respectively, encompass an *in rem* liability which encumbers a debtor's property and remains due after the discharge in a prior bankruptcy of the debtor's *in personam* liability of a secured debt?

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D. OPINIONS OF COURTS BELOW

1. *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990).
2. *In Re Johnson*, 96 B.R. 326 (D.Kan. 1989).
3. *In Re Johnson*, Case No. 87-10585, Slip Op. (Bankr. D.Kan. Apr. 8, 1988).

E. JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment on June 7, 1990. A petition for rehearing with suggestion for rehearing *en banc* was denied on August 1, 1990. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

F. STATUTES INVOLVED

1. 11 U.S.C. §101(11): "debt" means liability on a claim.

2. 11 U.S.C. §101(4): "claim" means –

   (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

   (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

3. 11 U.S.C. §102(2): "claim against the debtor" includes claim against property of the debtor.

G. STATEMENT OF THE CASE

Introduction

The Petitioner (hereinafter "Johnson") filed a Chapter 13 bankruptcy seeking to amortize an *in rem* liability that remained due after his discharge in a prior Chapter 7 bankruptcy of the *in personam* portion of the liability owed by Johnson to the Respondent (hereinafter "Bank") in connection with a mortgage loan made by the Bank to Johnson. The Bankruptcy Court confirmed Johnson's amended Chapter 13 plan, the District court reversed the Bankruptcy Court, and the Tenth Circuit Court of Appeals affirmed the District Court. The Bankruptcy Court was conferred with federal jurisdiction by 28 U.S.C. §1334 and 28 U.S.C. §157.

Background

[1]On May 1, 1978, Johnson and his wife ("the Johnsons") executed a promissory note in the amount of $165,000 in favor of Traveler's Insurance Company ("Travelers"). The note was secured by a first mortgage on two quarter sections of land in Edwards County, Kansas.

On June 2, 1978, the Johnsons executed a promissory note in the amount of $100,000 to the Bank. The Johnsons gave the Bank a second mortgage on the same two quarter sections of land to secure the Bank's loan.

[1] Petitioner here draws liberally from the facts recited by the District Court in its opinion. *In Re Johnson*, 96 B.R. at 326-328.

On February 25, 1983, the Johnsons executed another loan agreement with the Bank and borrowed $370,000. The loan was secured by various personal property and the 1978 real estate mortgage in the amount of $100,000.

The Johnsons defaulted on their notes with the Bank and on March 23, 1984, the Bank filed a foreclosure action in the Edwards County, Kansas District Court. On October 9, 1984, the Johnsons filed their joint Chapter 7 bankruptcy. On April 11, 1985, the Bankruptcy Court discharged the Johnsons from all dischargeable debts. Prior thereto, the Bankruptcy Court granted the Bank relief from the automatic stay to proceed with its foreclosure action previously filed in the Edwards County, Kansas District Court.

On October 9, 1985, the Edwards County District Court granted summary judgment in favor of the Bank. The court found the Bank was entitled to foreclose its June 2, 1978 mortgage and have the property sold, subject only to Travelers' first mortgage, to all oil and gas leases of record, and to the Johnsons' right to redeem the property. The property was sold at sheriff's sale for $473,013.41, which represented the combined bids of Travelers ($134,083.00) and the Bank ($337,172.45) and the additional sum of $1,757.96 for taxes.

On December 4, 1985, the Johnsons filed their notice of appeal from the Edwards County judgment. The appeal was transferred to the Kansas Supreme Court. Sometime prior to the Kansas Supreme Court's decision, the Bank purchased the first mortgage of Travelers and thereby became the holder of both mortgages.

On December 11, 1986, the Kansas Supreme Court reversed and remanded the case to the Edwards County, Kansas District Court with directions to set aside the sheriff's sale and deed, and for further proceedings in conformity with the opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). The Court held, *inter alia*, that when a trial court enters an order of foreclosure *in rem* against mortgaged land, it is error for the Court to fail to determine and state the amount of the judgment which is being entered against the land.

On remand, the district court granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000, plus accumulated interest. The court also found that the balance due on the first mortgage purchased by the Bank from Travelers amounted to $100,447.22. Further, the court granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes paid by the Bank. Finally, the court entered an order of sale specifying the property be sold by the sheriff on April 3, 1987.

On March 2, 1987, Johnson filed his Chapter 13 bankruptcy. Johnson listed the Bank as a partially secured creditor based on the value of the land and the amount of the *in rem* judgment against it. In his plan, Johnson proposed to pay the Bank the value of the land, with interest, over five years and treated the amount due on the Bank's *in rem* liability in excess of the value of the land as an unsecured claim. (See 11 U.S.C. §506(a)).

The Bank objected to Johnson's Chapter 13 plan contending, in part, that the debtor had improperly scheduled a debt which had previously been discharged in the Johnsons' Chapter 7 bankruptcy. The Bankruptcy Court

confirmed Johnson's amended plan over the Bank's objection. The District Court reversed the Bankruptcy Court and the Tenth Circuit Court of Appeals affirmed the District Court.

H. REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of two other circuit courts of appeals and several federal district courts and bankruptcy courts[2], and is contrary to a prior decision of this Court.[3]

The Tenth Circuit Court of Appeals held "that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. . . . " *Johnson*, 904 F.2d at 566. The Court's rationale was that because Johnson had discharged the *in personam* portion of the liability in a prior Chapter 7

[2] See, *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987); *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D.Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D.Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988); *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D.Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D.Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D.Pa. 1986). **But see the following cases holding contra:** *In Re Reyes*, 59 B.R. 301 (Bankr. S.D.Cal. 1986) (effectively overruled by *In Re Metz, supra*); *In Re McKinstry*, 56 B.R. 191 (Bankr. D.Vt. 1986); *In Re Binford*, 53 B.R. 307 (Bankr. W.D.Ky. 1985); *In Re Brown*, 52 B.R. 6 (Bankr. S.D.Ohio 1985).

[3] *Pennsylvania Department of Public Welfare v. Davenport*, ___ U.S. ___, 110 Sup. Ct. 2126, 109 L.Ed.2d 588 (1990).

bankruptcy, the remaining *in rem* liability against property owned by Johnson does not constitute a "debt" as defined by 11 U.S.C. §101(11). The decisions in *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) and *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989) hold exactly the opposite. Thus, the holding below creates a rule of law that deprives people subject to the Tenth Judicial Circuit's jurisdiction of a type of relief in bankruptcy which is expressly available to other people subject to the jurisdiction of the Ninth and Eleventh Judicial Circuits.[4]

Further, the Tenth Circuit's decision departs from this Court's recent decision in *Pennsylvania Department of Public Welfare v. Davenport*, ___ U.S. ___, 110 Sup. Ct. 2126, 109 L.Ed.2d 588 (1990), which recognized the "expansive language" Congress used in defining "debt" and "claim." *Id.* at 110 Sup. Ct. 2130, 109 L.Ed.2d 596. The decision glosses over the clear language of 11 U.S.C. §102(2) and ignores "the fundamental canon that statutory interpretation begins with the language of the statute itself." *Id.* at 110 Sup. Ct. 2130, 109 L.Ed.2d 595. In both *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) and *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989), the courts recognized that the clear

[4] The Tenth Circuit incorrectly states in its opinion that *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) is the only circuit court decision that has decided the issue presented here (904 F.2d at 565) even though Johnson advised the Court of *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989) in a supplementary letter submitted to the Court pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, at oral argument, and in Johnson's Motion for Rehearing and Suggestion for Rehearing *En Banc*.

language of the applicable statutes allows for a "claim" to be based on an encumbrance against the debtor's property with no associated *in personam* liability.[5] In the case below, however, the court rejects the clear language of 11 U.S.C. §102(2) and bases its decision on the statute's legislative history[6], ironically, the same legislative history other courts have relied upon to hold to the contrary.[7]

Further, in construing the definition of "claim" at 11 U.S.C. §101(4) and paragraphs (A) and (B) of that definition pertaining to a "right to payment," the Court in the case below expanded the language of the definition by adding another element to the definition – that the right to payment must be *from the debtor*.[8] However, the statute

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[5] See, *In Re Metz,* 820 F.2d at 1498 and *In Re Saylors,* 869 F.2d at 1436.

[6] *In Re Johnson,* 904 F.2d at 565-66.

[7] Compare *In Re Johnson,* 904 F.2d at 565-66, with *In Re Saylors,* 869 F.2d at 1436.

[8] The Court below states as follows: "Although the Bank has a right to an equitable remedy in the form of a state court foreclosure proceeding because Johnson breached performance on his promissory note, that right does not give rise to a 'right to payment.' The Bank no longer has a right to receive payment from Johnson due to his breach because Johnson obtained a discharge from personal liability under Chapter 7. Thus the Bank has no *right to payment from Johnson,* either directly or indirectly through a mortgage foreclosure action in state court. Accordingly, the Bank has no 'claim' as defined in either paragraph (A) or paragraph (B) of §101(4)." 904 F.2d at 566. (Emphasis original)

does not require the right to payment to be *from the debtor;* it simply requires that there be a right to payment.[9]

I. CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

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[9] In *In Re Ligon,* 97 B.R. 398, 403 (Bankr. N.D.Ill. 1989), the court states as follows: "[The mortgagee] has a right to payment resulting from the failure to make mortgage payments. Its right is to be paid from the proceeds of the foreclosure sale. Nothing in 11 U.S.C. in §101(4)(A) or (B) requires a right to payment from the debtor personally. The fact that the payment comes from the debtor's property as opposed to the debtor personally would seem to be irrelevant, a conclusion reinforced by 11 U.S.C. §102(2)."

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee and Cross-Appellant, v. CURTIS REED JOHNSON, Appellant and Cross-Appellee.	Nos. 89-3029 and 89-3031

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 88-1270-K)

W. Thomas Gilman of Redmond, Redmond & Nazar, Wichita, Kansas, for Appellant and Cross-Appellee.

Calvin D. Rider (Dennis E. Shay with him on the briefs) of Smith, Shay, Farmer & Wetta, Wichita, Kansas, for Appellee and Cross-Appellant.

Royce E. Wallace of Wallace & Zimmerman, Wichita, Kansas, for Amicus Curiae Royce E. Wallace, Standing Chapter 13 Trustee.

Patricia A. Reeder of Eidson, Lewis, Porter & Haynes, Topeka, Kansas, for Amicus Curiae Kansas Bankers Association.

Before **BRORBY,** Circuit Judge, **BARRETT,** Senior Circuit Judge, and **WEST,*** District Judge.

BRORBY, Circuit Judge.

Curtis Reed Johnson, Debtor, appeals from the reversal by the United States District Court for the District of Kansas of the Bankruptcy Court's confirmation of Johnson's Chapter 13 Plan. The facts are thoroughly presented in the district court's opinion, *In re Johnson*, 96 Bankr. 326 (Bankr. D. Kan. 1989). Basically, the Johnsons defaulted on two notes with Home State Bank (the Bank), which were secured by mortgages on two quarter sections of land farmed by the Johnsons. The Bank instituted foreclosure proceedings, and the Johnsons filed a joint Chapter 7 petition in bankruptcy court. The Johnsons were subsequently discharged of all dischargeable debts, and the state court then granted summary judgment in the Bank's favor, holding the Bank was entitled to foreclose on its mortgage and have the property sold. While foreclosure proceedings were pending, and one month before the property was scheduled to be sold by the sheriff, Curtis Johnson filed his voluntary Chapter 13 petition in bankruptcy. His Chapter 13 plan listed the Bank as a partially secured creditor, and the Bank filed an objection to confirmation of the plan. The bankruptcy court subsequently confirmed an amended plan submitted by Johnson, which proposed five annual payments to the Bank

* The Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

and a final balloon payment at the conclusion of the five-year plan. The district court reversed, concluding that Johnson's Chapter 13 plan could not be confirmed because it improperly scheduled a debt previously discharged under Chapter 7. 96 Bankr. at 330. Having so concluded, the court did not reach other issues raised by the Bank, i.e., that the Debtor lacked good faith and that the plan is infeasible. The Bank reasserts these issues in its cross-appeal to this court.

The fundamental issue presented by this case is whether a debtor who has been discharged from in personam liability on a secured debt may then reschedule that debt in a Chapter 13 proceeding under the Bankruptcy Code. This is an issue of law which we review de novo. As the district court found, the majority of courts that have considered this issue have answered it in the negative. 96 Bankr. at 329. *See, e.g., In re Reyes*, 59 Bankr. 301, 302 (Bankr. S.D. Cal. 1986); *In re McKinstry*, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986); *In re Binford*, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985); *In re Brown*, 52 Bankr. 6, 7 (Bankr. S.D. Ohio 1985). More recently, several courts have reached the opposite result, concluding that a debtor may, through a Chapter 13 plan, cure a default on a mortgage debt previously discharged under Chapter 7. *See, e.g., In re Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987); *In re Ligon*, 97 Bankr. 398, 403 (Bankr. N.D. Ill. 1989); *In re Hagberg*, 92 Bankr. 809, 814-16 (Bankr. W.D. Wis. 1988); *In re Klapp*, 80 Bankr. 540, 542 (Bankr. W.D. Okla. 1987); *In re Lagasse*, 66 Bankr. 41, 43 (Bankr. D. Conn. 1986); *In re Lewis*, 63 Bankr. 90, 90 (Bankr. E.D. Pa. 1986). *Metz*, the only circuit court to have decided this issue, holds that "a chapter 13 petitioner may include a mortgage claim

within a plan even though the underlying obligation of the mortgage was discharged in the debtors' prior bankruptcy case." 820 F.2d at 1498.

We disagree that the *Metz* approach is the preferred method of dealing with so-called "Chapter 20" bankruptcy filings. The *Metz* panel provides little explanation of its decision. Although it cites the rationales of the *Lagasse* and *Lewis* courts, it does not analyze or expressly adopt either. The panel merely concludes: "We find no statutory prohibition to such a practice [i.e., "Chapter 20 filings"] except the good faith filing requirement of [11 U.S.C. § 1325(a)(3)]." 820 F.2d at 1498.

Lagasse, which *Metz* cites, holds that Chapter 13 scheduling of a debt discharged under Chapter 7 is permissible, on the ground that when a debtor receives a Chapter 7 discharge of a secured debt, the debt relationship between the debtor and the secured party is converted to a nonrecourse obligation. 66 Bankr. at 43. *Lewis* reasons that, "under chapter 13, a creditor's 'claim' includes not only a right to payment but also the right to an equitable remedy for breach of performance. Therefore, 'a claim may include a creditor's encumbrance against property of the estate although there is no in personam liability against the debtor.' " *Metz,* 820 F.2d at 1498 (quoting *Lewis,* 63 Bankr. at 91-92). Based on these opinions, the *Metz* panel concludes that the only test a Chapter 13 plan must meet is whether it was submitted in "good faith," which is judged by the "totality of the circumstances." 820 F.2d at 1498. We reject this "gestalt approach to the good faith inquiry," *In re Hagberg,* 92 Bankr. at 815, and hold that the majority approach to "Chapter 20" filings is the better one.

While it is true that the Bankruptcy Code does not expressly prohibit what the debtor sought to do in this case, we do not believe Congress intended such a result. As the district court held,[1] where a mortgage obligation has been discharged under Chapter 7, the mortgagee no longer holds a claim against the debtor, but only a lien against the debtor's property. 96 Bankr. 329-30. That lien is "not accompanied by any obligation, note, debt, or right to payment." Accordingly, Home State Bank is not a "creditor" of Johnson and holds no claim that can be scheduled in Johnson's Chapter 13 plan.

We acknowledge the Code's rule of construction, which states that " 'claim against the debtor' includes claim against property of the debtor," 11 U.S.C. § 102(2), but reject the argument that the Bank's lien against the Johnson property, which survived Johnson's Chapter 7 proceeding, is a "claim against the debtor" that can be scheduled in a Chapter 13 plan. In reaching this conclusion we rely in part on the explanation of the Senate Committee on the Judiciary that § 102(2) "is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally. . . . " S. Rep. No. 989,

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[1] In the following discussion, we borrow liberally from the district court's thorough opinion. We also note and correct one minor inadvertent error in the district court's opinion. At 96 Bankr. 328, the court states: "[T]he *in rem* liability of the property held as security remains unaffected and unenforceable by the mortgagee after discharge." This sentence should read "unaffected and *enforceable.*"

95th Cong., 2d Sess. 28 (1978). Here there clearly was no "agreement" between Johnson and Home State Bank for a nonrecourse mortgage loan. For this reason, we find the *Lagasse* and *Ligon* courts' analogy to nonrecourse loans inapt.

On its face, the *Ligon* court's treatment of the nonrecourse loan analogy is thorough, *see* 97 Bankr. at 402-03, but it overlooks the significance of the legislative history of § 102(2). Even though the court recognized there is no agreement for a nonrecourse loan in these cases, *id.* at 402, it nevertheless construes § 102(2) as providing that a mortgagee's lien is a debt for Bankruptcy Code purposes. *Ligon* faults courts adhering to the majority view for "ignor[ing] or gloss[ing] over the existence of 11 U.S.C. § 102(2)." *Id.* at 403. This criticism is misplaced, however, because the *Ligon* court's interpretation ignores the statute's illuminating legislative history.

Clearly, the Bank and Mr. Johnson did not bargain for a nonrecourse mortgage loan. Allowing Mr. Johnson to reschedule its debt to the Bank under chapter 13, after failing to reaffirm the discharged debt in his Chapter 7 action, would allow Mr. Johnson to impose on the Bank a unilateral reaffirmation of the mortgage. Because the Bank could have refused to agree to a reaffirmation of the mortgage in Johnson's Chapter 7 proceeding, *see* 11 U.S.C. § 524(c), it cannot effectively be forced to agree to a reaffirmation now by confirming scheduling in Johnson's Chapter 13 plan. *See In re Russo*, 94 Bankr. 127, 129 (Bankr. N.D. Ill. 1988); *In re McKinstry*, 56 Bankr. at 193.

Similarly, the Bank does not have a "claim" against Johnson as defined in 11 U.S.C. § 101(4). That statute defines claim as a:

> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance *if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(Emphasis added.) Clearly, the Bank has no "right to payment" from Johnson under § 101(4)(A), because Johnson's personal liability on the mortgage was discharged under Chapter 7. Moreover, the Bank has no right to an equitable remedy for breach of performance which gives rise to a right to payment under § 101(4)(B). Although the Bank has a right to an equitable remedy in the form of a state court foreclosure proceeding because Johnson breached performance on his promissory note, that breach does not give rise to a "right to payment." The Bank no longer has a right to receive payment from Johnson due to his breach because Johnson obtained a discharge from personal liability under Chapter 7. Thus, the Bank has no *right to payment from Johson*, either directly or indirectly through a mortgage foreclosure action in state court. Accordingly, the Bank has no "claim" as defined in either paragraph (A) or paragraph (B) of § 101(4).

Because we hold that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7, we do not reach the good-faith and feasibility issues raised by the Bank.[2] We affirm the district court's ruling reversing Johnson's Chapter 13 plan and remand to the bankruptcy court for further proceedings as necessary.

AFFIRMED.

[2] We note, however, that the Bank presents compelling arguments with respect to each of these issues.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	Civil No.
CURTIS REED JOHNSON,	)	88-1270-K
	)	FILED
Debtor.	)	JAN 3 '89
	)	

MEMORANDUM AND ORDER

Home State Bank of Lewis, Kansas (the "Bank"), creditor, appeals from the bankruptcy court's confirmation of the Chapter 13 Plan of Curtis Reed Johnson, debtor. The Bank seeks reversal of the order confirming the plan on the ground the plan lacks feasibility, was not proposed in good faith, and improperly schedules a debt previously discharged in the debtor's Chapter 7 bankruptcy proceeding.

The court previously heard oral argument on this appeal, but reserved ruling at that time. After reviewing the briefs and supporting documentation filed by the parties, as well as an amicus curiae brief filed by the Kansas Bankers Association, the court is now prepared to rule.

In reviewing the bankruptcy court's decision, this court is bound by the factual findings of the bankruptcy court unless they are clearly erroneous. The legal conclusions of the bankruptcy court, however, are subject to *de novo* review by this court. *In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988); *In re Branding Iron Motel, Inc.*, 798 F.2d 396, 399 (10th Cir. 1986).

The facts relevant to this appeal are as follows:

On May 1, 1978, Curtis Johnson and his wife, Donna Jo Johnson, ("the Johnsons") executed a promissory note in favor of Travelers Insurance Company ("Travelers") in the amount of $165,000.00. The note was secured by a first mortgage on two quarter sections of land in Edwards County, Kansas.

On June 2, 1978, the Johnsons executed a promissory note in the amount of $100,000.00 to the Home State Bank. To secure the loan, the Johnsons gave the Bank a second mortgage on the Edwards County property. The mortgage states that it is subject to the first mortgage of Travelers. Both the first and second mortgages contained clauses whereby in the event of a default, any royalty income received by the Johnsons from certain oil and gas leases on the property would be assigned to the mortgagees.

On February 25, 1983, the Johnsons executed another loan agreement with the Bank through which the Johnsons received a line of credit in the aggregate amount of $370,000.00. The Johnsons executed two notes with respect to this loan agreement, a renewal note in the amount of $310,000.00 and a new note in the amount of $60,000.00. The loans were secured by security agreements on various personal property and by the 1978 real estate mortgage in the amount of $100,000.00.

The Johnsons subsequently defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against the Johnsons in the District Court of Edwards County, Kansas. The Bank sought judgment against the Johnsons for the balance due on the

renewal note, plus interest, and for foreclosure of its mortgage and sale of the real estate and the royalty interests and the personal property covered by the security agreements.

The Johnsons filed their joint Chapter 7 petition in bankruptcy on October 9, 1984. On April 11, 1985, the bankruptcy court discharged the Johnsons from all dischargeable debts. At approximately the same time, the bankruptcy court entered an order granting the Bank relief from the automatic stay to proceed with the foreclosure action it had previously filed in the District Court of Edwards County.

On October 9, 1985, the District Court of Edwards County granted summary judgment in favor of the Bank. The court found the Bank was entitled to foreclose its June 2, 1978 mortgage and have the property sold, subject only to Travelers' first mortgage, to all oil and gas leases of record, and to the Johnsons' right to redeem the property.

Pursuant to the order of sale, the property was subsequently sold for the sum of $473,013.41. That sum represented the combined bids of Travelers ($134,083.00) and the Bank ($337,172.45), and the additional sum of $1,757.96 for taxes.

On December 4, 1985, the Johnsons filed their notice of appeal from the judgment of the Edwards County District Court. The appeal was subsequently transferred to the Kansas Supreme Court. Sometime prior to resolution of the case by the Kansas Supreme Court, the Bank purchased the first mortgage of Travelers and thus became the holder of both mortgages.

On December 11, 1986, the Kansas Supreme Court reversed and remanded the case to the district court with directions to set aside the sheriff's sale and deed, and for further proceedings in conformity with the opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). The court held, *inter alia*, that when a district court enters an order of foreclosure *in rem* against mortgaged land, it is error for the court to fail to determine and state the amount of the judgment which is being entered against the land.

On remand, the district court granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000.00, plus accumulated interest. The court also found that the balance due on the first mortgage previously owned by Travelers and purchased by the Bank amounted to $100,447.22. Further, the court granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes paid by the Bank. Finally, the court entered an order of sale specifying that the property be sold by the sheriff on April 3, 1987.

On March 2, 1987, Curtis Johnson filed his voluntary Chapter 13 petition in bankruptcy. The debtor listed the Bank as a partially secured creditor based on the district court's most recent entry of judgment. On May 7, 1987, the Bank filed a "secured" proof of claim in this matter in the amount of $511,421.55, and on June 3, 1987, the Bank filed a detailed objection to the confirmation of the debtor's proposed plan.

On June 23, 1987, the bankruptcy court held debtor's plan "not confirmable for lack of feasibility on present circumstances," but gave the debtor an opportunity to

present an amended plan. (Tr., p. 108.) The debtor subsequently filed his first amended plan and the Bank again filed objection to the debtor's proposed plan.

Under the amended plan, the debtor proposes to pay to the Bank the Edwards County District Court judgment in five annual installments of $11,100.00, $35,520.00, 35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92 at the conclusion of the 5-year plan. The plan further proposes to make monthly payments through the trustee in the amount of $291.42 to Mid-Kansas Federal Savings and Loan Association, with a balloon payment of $6,507.00 to that institution at the end of the 60-month plan.

The bankruptcy court confirmed debtor's first amended Chapter 13 plan on April 8, 1988. While the debtor has made the first payment due to the trustee in the amount of $11,100.00, as of December 9, 1988, he had not yet made his 1988 annual payment of $35,520.00.

The Bank now appeals from the bankruptcy court's order confirming the debtor's Chapter 13 plan. The Bank contends the court erred in confirming the plan because the plan included debts previously discharged in debtor's Chapter 7 proceedings. The Bank further argues the bankruptcy court erred in finding the debtor's plan was feasible and proposed in good faith.

The Bank first contends reversal of the bankruptcy court's order confirming the debtor's Chapter 13 plan is required because the court improperly permitted the debtor to schedule a debt which had been previously discharged in Chapter 7 proceedings. The Bank points out that while Chapter 13 permits a qualified debtor to

reschedule his obligations, the plan can only deal with the debtor's "creditors". A "creditor" is an "entity that has a claim against the debtor." 11 U.S.C. § 101(9). A "claim" is a "right to payment, . . . " or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, . . . " 11 U.S.C. § 101(4). The Bank reasons that when the debtor's obligation to the Bank was discharged under Chapter 7, the debtor no longer had any personal liability to the Bank, and therefore the Bank had no right to payment from the debtor and no "claim" against the debtor which could be scheduled in a Chapter 13 plan.

The debtor acknowledges that the Bank holds a lien against his property but no longer holds any claim against him personally. Nevertheless, the debtor contends the Bank has a "claim" against him which can be restructured in a Chapter 13 proceeding. The debtor reaches this conclusion by broadly defining the term "claim" to include claims against the debtor's property.

The bankruptcy court agreed with the debtor herein and found that even though a debtor's personal liability on a mortgage has been discharged, the debtor may propose a confirmable plan under Chapter 13 to satisfy the liability. The court held:

> A creditor's "claim" under Chapter 13 includes not only a right to payment but also a right to an equitable remedy for breach of performance.
>
> When a debtor receives a discharge of a secured debt it changes the debt relationship between the parties to a nonrecourse obligation. The reamortization of a nonrecourse obligation, therefore, may be accomplished in a Chapter 13 plan.

(Memorandum of Decision, Apr. 8, 1988, pp. 10-11) (citations omitted.) Because the bankruptcy court's conclusion is a legal one, it is subject to *de novo* review by this court.

The Tenth Circuit Court of Appeals has recognized that although a debtor has been discharged from personal liability on a secured debt under Chapter 7, the *in rem* liability of the property held as security remains unaffected and unenforceable by the mortgagee after discharge. *See Chandler Bank of Lyons v. Ray*, 804 F.2d 577, 579 (10th Cir. 1986). *See also* 3 COLLIER ON BANKRUPTCY ¶524.01[3] (L. King. 15th ed. 1988). The court is unaware, however, of any controlling authority on the issue of whether a debtor who has been discharged from *in personam* liability on a secured debt may then reschedule that debt in a Chapter 13 proceeding.

The majority of courts which have considered the issue now before this court have found that a debtor may not schedule a debt in a Chapter 13 plan if that debt has been previously discharged in a Chapter 7 proceeding. *See, e.g., In re McKinstry*, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986) (debtor may not unilaterally reaffirm a discharged debt in an attempt to avoid foreclosure by scheduling the creditor in a proposed Chapter 13 plan); *In re Binford*, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985) (debtor could not include with Chapter 13 plan a proposal to cure arrearage due a secured real estate mortgagee where mortgagee was listed and discharged in previously filed Chapter 7 proceeding and no reaffirmation or redemption agreement was executed, since mortgage created no legal obligations upon debtor, and underlying debt had been discharged); *In re Brown*, 52 Bankr. 6, 7 (Bankr. S.D. Ohio W.D. 1985) (Chapter 13 case, filed after discharge of

Chapter 7 case, could not be utilized to compel mortgagee to accept cure of arrearage owed on defaulted mortgaged).

The primary rationale underlying these decisions was recently summarized in *In re Hagberg, to be reported at* 92 Bankr. 809 (Bankr. W.D.Wis. 1988), as follows:

> First, because a chapter 13 plan can only deal with "creditors," a plan proposing to cure a default on a discharged mortgage obligation is statutorily defective since the mortgagee holding the discharged debt is no longer a "creditor" of the mortgagor. Second, this treatment of the mortgagee constitutes the imposition of a unilateral reaffirmation of the discharged debt, contrary to the consensual character of reaffirmation under the Bankruptcy Code.

More recently, a number of courts have taken a different approach, holding that a debtor may, through a Chapter 13 plan, cure a default on a mortgage debt previously discharged under Chapter 7. *See, e.g., Matter of Metz,* 820 F.2d 1495, 1498 (9th Cir. 1987) (Chapter 13 petitioner may include a mortgage claim within a plan even though the underlying obligation of the mortgage was discharged in debtor's prior chapter 7 case); *In Re Hagberg,* 82 Bankr. 809 (even though creditor's only rights are against property of the debtor, creditor has a "claim" against the debtor which may be scheduled in Chapter 13 plan); *In re Klapp,* 80 Bankr. 540, 542 (Bankr. W.D. Okla. 1987) (a mortgage securing a debt previously discharged in Chapter 7 proceedings constitutes a nonrecourse obligation, and thus can be scheduled in a Chapter 13 plan); *In re Lewis,* 63 Bankr. 90, 92 (Bankr. E.D. Pa. 1986) (although

debtor's personal obligation to mortgagee has been discharged in prior Chapter 7 proceeding, debtor's obligation to mortgagee was still a "claim" which could be scheduled in debtor's Chapter 13 plan).

The basis for these decisions was succinctly explained by the court in *In re Hagberg,* 82 Bankr. at ___, as follows:

> Reasoning that the surviving in rem obligation held by the mortgagee is the equivalent of a nonrecourse obligation, the courts adopting this position conclude that since the Code specifically treats nonrecourse obligations as a claim against the debtor, the only inhibition imposed by the Code is the good faith requirement of [11 U.S.C.] section 1325(a)(3).

While the court recognizes that this approach, i.e., permitting the debtor to schedule in a Chapter 13 plan a debt which has been previously discharged under Chapter 7, constitutes the "emerging view," *In re Hagberg,* 92 Bankr. at ___, the court is not persuaded that it is the correct approach.

Rather, the court finds that a debt which has been discharged in a Chapter 7 proceeding in which no reaffirmation or redemption agreement was executed, cannot be scheduled in the debtor's subsequent Chapter 13 plan. The court is convinced that where, as here, a mortgage obligation has been discharged under Chapter 7, the mortgagee no longer holds a "claim" against the debtor, but rather, holds only a lien against the debtor's real estate. Thus, the mortgagee is not a "creditor" of the debtor and holds no claim which can be scheduled in debtor's Chapter 13 plan.

11 U.S.C. § 101(4) defines "claim" as a:

> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance *if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(Emphasis added.)

It is clear to the court that the Bank has no "right to payment" from the debtor herein since the debtor's personal liability on the underlying obligation was discharged under Chapter 7. Thus, the bank has no "claim" against the debtor as that term is defined at § 101(4)(A). Moreover, the court does not concur with the bankruptcy court's determination that the Bank has a right to an equitable remedy for breach of performance which gives rise to a right of payment. While the bank may have the right to an equitable remedy in the form of a state court foreclosure action because the debtor has breached performance on a promissory note, it cannot be said that the debtor's "breach" gives rise to a right of payment. The Bank will never have a right to receive payment from the debtor's "breach" because the debtor obtained a discharge under Chapter 7. Simply said, the Bank has no right to payment from the debtor – either directly or through a mortgage foreclosure action in state court.

Nor does the court find that the Bank's interest in the debtor's property can properly be characterized as a "nonrecourse loan agreement." The Bank holds a lien against the debtor's real estate which is not accompanied by any obligation, note, debt, or right to payment upon the debtor's breach of performance.

Finally, the court finds it significant that the debtor had an opportunity to negotiate a reaffirmation of the discharged debt during the Chapter 7 proceeding, but failed to do so. 11 U.S.C. § 524(c); *In re McKinstry*, 56 Bankr. at 193. Therefore, the court will not now permit the debtor to impose a unilateral reaffirmation of the mortgage upon the mortgagee by scheduling the discharged debt in a Chapter 13 plan. *Id. See also In re Binford*, 53 Bankr. at 309; *In re Brown*, 52 Bankr. at 7.

Because the court concludes today that the debtor's Chapter 13 plan cannot be confirmed because it improperly schedules a debt previously discharged under Chapter 7, the other issues raised by the Bank – i.e., that the debtor's Chapter 13 plan was not proposed in good faith and lacks feasibility – are moot and will not be taken up by the court.

IT IS ACCORDINGLY ORDERED this 3 day of January, 1989, that the bankruptcy court's order affirming debtor's Chapter 13 plan is reversed.

/s/ Patrick F. Kelly
PATRICK F. KELLY, JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	) Case No. 87-10585
CURTIS REED JOHNSON,	) Chapter 13
	)
Debtor.	) Filed
	) APR 08 1988

MEMORANDUM OF DECISION

This matter comes before the Court upon Home State Bank of Lewis, Kansas' objection to confirmation based upon feasibility of debtor's Chapter 13 plan. Curtis Reed Johnson ("debtor") appears by W. Thomas Gilman of Redmond, Redmond & Nazar, Wichita. Home State Bank of Lewis, Kansas ("the Bank") appears by Dennis E. Shay of Smith, Shay, Farmer & Wetta, Wichita. The standing trustee, Royce E. Wallace, appears personally.

FACTS

The Court finds the following to be the relevant facts.

1. On May 1, 1987 the debtor and Donna Jo Johnson ("the Johnsons") executed a promissory note in favor of the Travelers Insurance Company ("Travelers") in the amount of $165,000.00 payable with interest at the rate of nine and one-half percent (9.5%) per annum with semiannual payments due on January 1 and July 1 of each year and the principal balance being due on January 1, 1993. The promissory note was secured by a first mortgage on the following property owned by the debtor, to-wit:

> The Northeast Quarter (NE/4) of Section Twelve (12), Township Twenty-five South (T25S), Range Seventeen West (R17W) and the Northwest

> Quarter (NW/4) of Section Seventeen (17), Township Twenty-five South (T25S), Range Sixteen West (R16W), all in Edwards County, Kansas.

2. On June 2, 1978 the debtor executed a promissory note and mortgage in the principal amount of $100,000.00 in favor of the Bank, granting the Bank a security interest in the above described real property. Both the first and second mortgages contained clauses whereby in the event of default the Johnsons' royalty income would be assigned to the respective mortgagees.

3. On February 25, 1983 the Johnsons executed a written loan agreement in favor of the Bank, a promissory note in the principal amount of $310,000.00 with interest at fourteen and one-half percent (14.5%) per annum with a maturity date of December 1, 1983, and a promissory note in the principal amount of $60,000.00 with an interest rate of fourteen and one-half percent (14.5%). The loans were secured by the above mentioned mortgage to the Bank dated June 2, 1978, in the amount of $100,000.00, as well as certain machinery and equipment for which the Johnsons executed security agreements.

4. The Johnsons became delinquent on their payments to the Bank.

5. On March 23, 1984 the Bank filed a foreclosure action against the Johnsons in Edwards County, Kansas district court to foreclose its mortgage.

6. On October 9, 1984, the Johnsons filed a voluntary Chapter 7 petition (Case No. 84-11667).

7. This Court entered an order lifting the automatic stay for purposes of foreclosure and allowed the Bank to

proceed in rem against the Johnsons with a foreclosure proceeding that it had previously filed in Edwards County, Kansas district court.

8. On April 11, 1985 the Johnsons obtained their discharge in bankruptcy.

9. On October 9, 1985 the Edwards County, Kansas district court granted the Bank's motion for summary judgment and ordered the above mentioned property to be sold on December 6, 1985 at 10:00 a.m. The Edwards County sheriff sold the Johnsons' real property, accepting a bid from the Bank in the total amount of $473,013.41. The bid consisted of $134,083.00 by Travelers and an additional bid of $338,930.41 by the Bank. This sale was confirmed by the Edwards County district court.

10. On December 4, 1985 the Johnsons filed their notice of appeal from the judgment of the Edwards County, Kansas district court. On June 6, 1986 upon the motion of the Johnsons, the appeal was transferred to the Kansas Supreme Court.

11. The Bank purchased the first mortgage of Travelers, prior to the decision of the Kansas Supreme Court. As such the Bank was the holder of both mortgages when the Supreme Court made its decision.

12. On December 11, 1986, the Kansas Supreme Court issued its opinion reversing and remanding the decision of the Edwards County, Kansas district court with instructions to set aside the sheriff's sale and for further proceedings in conformity with the Court's opinion. (*See Home State Bank v. Johnson*, 240 Kan. 417 (1986)).

13. On February 9, 1987 the case came before the Edwards County, Kansas district court on remand from the Kansas Supreme Court. On February 10, 1987 a journal entry of judgment on remand was filed, which was modified by a nunc pro tunc journal entry filed February 17, 1987. The journal entry granted the Bank a judgment on its second mortgage in rem against the property subject to the mortgage in the principal amount of $100,000.00 plus accumulated interest from December 2, 1983 through January 7, 1987 at the simple rate of fourteen and one-half percent (14.5%) per annum in the amount of $44,930.13 with a per diem rate after January 7, 1987 in the amount of $39.72. The court also found that the balance due on the first mortgage previously owned by Travelers and purchased by the Bank amounted to $100,447.22 with per diem interest at the rate of $25.46 after January 7, 1987. The court also granted the bank an in rem judgment in the amount of $1,757.96 for taxes paid by the Bank attributable to the above mentioned real property.

14. Thereafter the court entered an order of sale specifying that the above mentioned real property be sold by the Edwards County sheriff. The sale was scheduled for April 3, 1987 at 10:00 a.m.

15. On February 24, 1987 Donna Jo Johnson executed a quitclaim deed to her husband, the debtor herein, transferring all of her ownership interest in the aforedescribed real property to him. The quitclaim deed was filed with the Edwards County Register of Deeds on February 26, 1987. On February 24, 1987 Douglas T. Johnson and Diane J. Johnson (son-in-law and daughter-in-

law of the Johnsons), executed a quitclaim deed transferring all ownership interests they had as of that date in the following described real property to the debtor herein:

> The Northeast Quarter (NE/4) of Section Twelve (12), Township Twenty-five South (T25S), Range Seventeen West (R17W), Edwards County, Kansas.

This quitclaim deed was filed with the Edwards County Register of Deeds on February 26, 1987.

16. On March 2, 1987 debtor filed his voluntary Chapter 13 petition. The debtor scheduled the Bank as a partially secured creditor based on the journal entry of judgment filed February 10, 1987 and the nunc pro tunc journal entry filed February 18, 1987.

17. After the foreclosure sale, during the pendency of the appeal to the Kansas Supreme Court, the debtor's exemption rights expired. Upon reversal by the Supreme Court, the Edwards County, Kansas district court ordered that the net proceeds from the Bank's farming operation on the realty be paid over to debtor.

18. On May 7, 1987 the Bank filed a "secured" proof of claim in this matter in the amount of $511,421.55. On May 14, 1987 the debtor objected to the same.

19. On June 3, 1987 the Bank filed a detailed objection to the confirmation of the debtor's proposed plan, specifying ten separate objections.

20. Under the plan the debtor proposes to pay the Bank the Edwards County district court judgment in the amount of $202,205.18 on the first and second mortgage held by the Bank with interest payments at nine and one-

half percent (9.5%) per annum in four annual installments of $35,520.00, $35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92.

21. The plan proposes to make monthly payments through the trustee in the amount of $291.42 to Mid-Kansas Federal Savings and Loan Association, with a balloon payment to that institution at the end of the sixty-month plan.

22. During the five-year term the debtor's amended plan provides for payment of ten percent (10%) of all unsecured claims.

23. The debtor will be able to make the payments provided under the plan.

DISCUSSION

The Court is called upon to consider a legal maneuver sometimes referred to as a "Chapter 20." The debtor previously filed a Chapter 7 and now seeks to retain his farm, and reamortize the secured liability which survived, through a Chapter 13 plan. At issue is whether a Chapter 13 debtor may include within the plan amortized payments on a debt which was listed and discharged in a previous Chapter 7 proceeding. Parenthetically it should be noted that the debtor would not have been eligible for Chapter 13 until the discharge of his unsecured debt. For the reasons herein set forth, the debtor's plan is confirmed, and the Bank's objections are overruled.

JURISDICTION

Initially the Bank attacks the Court's jurisdiction in this matter, stating that debtor is not eligible for Chapter 13 relief due to debtor's recent discharge under Chapter 7. This is a misinterpretation of the Code. Section 727 bars a debtor from filing a second petition under Chapter 7 within the six-year period. 11 U.S.C. § 727(a)(8). The six-year bar to discharges found in § 727(a)(8) does not apply to cases commenced under Chapter 13; § 727(a)(8) applies only to cases under Chapter 7. *In re Baker,* 736 F.2d 481 (8th Cir. 1984); *In re Galt,* 70 B.R. 57 (Bankr. S.D. Ohio 1987); *In re Hubbard,* Case No. 86-10511, Slip Op. (Bankr. D. Kan. Dec. 19, 1986); *In re Ponteri,* 31 B.R. 859 (Bankr. D. N.J. 1983); *In re Meltzer,* 11 B.R. 624 (Bankr. E.D. N.Y. 1981).

CLAIM

The right of a Chapter 13 debtor to modify the rights of certain holders of secured claims is not disputed. 11 U.S.C. § 1322(b)(2). *See DiPierro v. Taddeo (In re Taddeo),* 685 F.2d 24 (2d Cir. 1982). That right has been recognized following a state court final judgment of foreclosure. *Valente v. Savings Bank of Rockville,* 34 B.R. 362 (D.C. Conn. 1983).

The courts are divided in the issue of whether an in rem right, as exists in this case, constitutes a "claim" as defined by the Bankruptcy Code. § 102(2). The Bank's argument is that as a matter of law a Chapter 13 debtor cannot modify its rights following discharge in a previous Chapter 7 case because there is no cognizable "claim" to modify. The caselaw supporting this appears to be the

minority view.[1] *In re Reyes,* 59 B.R. 301 (Bankr. S.D. Cal. 1986) (Chapter 13 cannot confirm reaffirmation of a debt that was discharged under Chapter 7), *overruled by Matter of Metz,* 820 F.2d 1495 (9th Cir. 1987); *In re McKinstry,* 56 B.R. 191 (Bankr. D. Vt. 1986) (debtor may not unilaterally reaffirm a discharged debt by scheduling a creditor in a proposed Chapter 13 plan); *In re Brown,* 52 B.R. 6 (Bankr. S.D. Ohio 1985) (Chapter 13 debtor could not include in plan proposal to cure arrearage due mortgagee where mortgaged debt discharged in prior Chapter 7 case and no reaffirmation agreement executed as mortgage created no obligation on debtor and underlying debt discharged); *In re Fryer,* 47 B.R. 180 (Bankr. S.D. Ohio 1985); *Associates Financial Service Corp. v. Cowen,* 29 B.R. 888 (Bankr. S.D. Ohio 1983).

The better and apparently majority view is that a Chapter 13 debtor may include a mortgage claim within a plan, although the underlying obligation of the claim was discharged in debtor's prior Chapter 7 case. *Matter of Metz,* 820 F.2d 1495 (9th Cir. 1987); *In re Gayton,* 61 B.R. 612 (9th Cir. B.A.P. 1986) (prior discharge under Chapter 7 did not preclude Chapter 13 relief); *Matter of Lagasse,* 66 B.R. 41 (Bankr. D. Conn. 1986) (Chapter 13 debtors not barred from including in a plan treatment of a mortgage

[1] While both parties have referred to this as the majority, it appears, however, to be the minority view. One circuit has held that a debtor does have a claim even though the underlying mortgage was discharged in a prior Chapter 7. *See, e.g., Matter of Metz,* 820 F.2d 1495 (9th Cir. 1987); *In re Gayton,* 61 B.R. 612 (9th Cir. B.A.P. 1986). Although it appears that this position was formerly a minority, the Court believes the Ninth Circuit opinions now constitute the majority view.

claim where underlying obligation of the mortgage had been discharged in debtor's prior bankruptcy case); *In re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986) (an encumbrance against property constitutes a claim under the Code even though there is no in personam liability against the debtor).

The Court believes, absent controlling authority from the Circuit, that the *Metz* opinion is better reasoned. Even though a debtor's personal liability on a home mortgage has been discharged, the debtor may propose a confirmable plan under Chapter 13 to satisfy the liability. A creditor's "claim" under Chapter 13 includes not only a right to payment, but also a right to an equitable remedy for breach of performance. *Lewis, supra* at 91.[2]

When a debtor receives a discharge of a secured debt it changes the debt relationship between the parties to a nonrecourse obligation. § 506(d); *Matter of Lagasse, supra* at 43. The reamortization of a nonrecourse obligation, therefore, may be accomplished in a Chapter 13 plan.

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[2] The Bank criticized debtor's reliance upon *Lewis* and stated that *Lewis* is distinguishable because, unlike the present situation, the Chapter 13 debtor in that case was not in default under the mortgage. The Court, under the present facts, finds this difference not critical to the Court's conclusion. During the pendency of the debtor's appeal to the Kansas Supreme Court, the debtor's redemption rights expired, thereby further hindering the debtor's ability to remove the mortgage agreement from default. The current state of the mortgage arrearage should not dictate the policy under Chapter 13. Under the present facts this situation should not render the Bank's "claim" ineligible under Chapter 13.

GOOD FAITH

The Bank's next objection to the debtor's plan is that it is not filed in good faith. The Bank contends that due to the serial filings of debtor's two petitions, the debtor's plan has been proposed in bad faith in violation of § 1325(a)(3). The Bank's position is that serial bankruptcy filings demonstrate a lack of good faith. The Bankruptcy Code provides that the bankruptcy court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." § 1325(a)(3). "The good faith requirement is neither defined in the Bankruptcy Code nor discussed in the legislative history. The phrase should, therefore, be interpreted in light of the structure and general purpose of chapter 13." *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 431-432 (6th Cir. 1982).

In this Circuit the determination of the debtor's good faith must be made from a review of a variety of factors. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). In *Flygare* the Circuit set out a nonexhaustive list of eleven factors to be considered by the court. The factors need not be given the same weight. The court clearly disapproved any per se rule which would result in summary denial of confirmation of a Chapter 13 plan based on lack of good faith.

Therefore, when considering the good faith of the debtor, this Court has wide latitude in determining whether a plan was filed in good faith. *In re Lewis, supra* at 93. Serial bankruptcy filings are not per se in bad faith. *In re Baker*, 736 F.2d 481 (8th Cir. 1984); *In re Metz*, 67 B.R. 462 (9th Cir. B.A.P. 1986), *aff'd.*, 820 F.2d 1495 (9th Cir. 1987); *In re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986); *In re*

Beauty, 42 B.R. 655 (D.C. E.D. La. 1984), *appeal dismissed*, 745 F.2d 53 (5th Cir. 1984). *But see In re Brown*, 52 B.R. 6 (Bankr. S.D. Ohio 1985); *In re Heywood*, 39 B.R. 910 (Bankr. W.D. N.Y. 1984); *In re Sardella*, 8 B.R. 401 (Bankr. S.D. Ohio 1981). The Bank relies on the assumption that debtor's second bankruptcy case was filed in an effort to salvage debtor's farm, and as such, evidences bad faith. The Bank's reliance on this assumption is misplaced. While abuse of legal process may constitute bad faith, use of it alone does not.[3]

The record contains no indication that the debtor proposed his plan in bad faith. The debtor proposes to pay the full value, including interest, of all property in which the Bank is secured. The Bank, under the plan, is to receive all its proceeds from the oil and gas production. Under the facts presented here the Court finds no basis for concluding that the plan was proposed in bad faith.

FEASIBILITY

While the parties generally refer to feasibility as an element of confirmation, the Court need only conclude that the debtor will be able to make payments under the plan. § 1325(a)(6). Payments are determined by three factors: (1) the amount of the debt or the value of the

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[3] This must be distinguished from serial filings made for the sole purpose of delaying a foreclosure sale. Had the debtor filed an earlier reorganization, which had been dismissed for failure to comply with court orders or file a plan, the Court might view the serial filing differently. At some point serial filing becomes abuse of process, not use of it.

property; (2) the appropriate discount factor; and (3) the term of repayment.

The debtor's plan proposes to pay the trustee $291.42 per month with a balloon payment of $7,222.77 to retire the debt held by Mid-Kansas Federal. The plan proposes to pay five annual payments to the Bank to satisfy interest on the debt and to liquidate the balance with a balloon in the amount of $80,625.92 at the end of the term. That payment will have to be obtained from a commercial lender. The balloon payment reflects approximately fifty-six percent (56%) of the appraised value of the debtor's real estate. Such a loan does not seem unlikely and therefore will not hinder confirmation. From the evidence, it appears that the debtor will be able to make the payments under the plan. The debtor testified that he will be able to make the payments. While the Bank was able to cast some doubt on his projections of income and expenses, there is no evidence to contradict the debtor's testimony. Thus, the Court concludes that the plan is "feasible."

VALUATION

The value of the claim filed by the Bank is limited to the in rem judgment of the Kansas Supreme Court. Turning to the valuation proposed by the debtor, the Court will accept the values determined by the debtor's witness. The projections proposed by the debtor's witness on the oil and gas runs, although not unreasonable, are slightly exaggerated. The same can be said for the projections on crop yields.[4] The witness' cash flow projections,

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[4] The plan represents that fifteen percent (15%) of debtor's farm income is to come from government payments. The Court

(Continued on following page)

although exaggerated, are also reasonable. The problem here is that the Bank has offered no expert testimony of its own to contradict these projections. Therefore, the debtor's values will be accepted.

The debtor's figures suggest a plan which is confirmable. Thus, the Court accordingly holds that the debtor's plan, as amended, shall be confirmed.

The foregoing constitutes findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 7052. A separate judgment will be entered giving effect to the determinations reached herein.

Signed this 8th day of April, 1988.

/s/ John K. Pearson
JOHN K. PEARSON
United States Bankruptcy Judge

CERTIFICATE OF MAILING

The undersigned hereby certifies that the above and foregoing Memorandum of Decision has been furnished

(Continued from previous page)

recognizes that it is not known whether government payments will continue beyond 1988. The estimation and continuation of government payments is, at best, speculative. However, the Court cannot conclude that even the total discontinuation of government payments would critically hinder debtor's ability to make payments under the plan.

by United States mail, postage prepaid, this 8th day of April, 1988, to:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	)	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee/Cross-Appellant,	)	Nos. 89-3029 89-3031
v.	)	(D.C. No. 88-1270-K)
CURTIS REED JOHNSON, Appellant/Cross-Appellee,	)	
ROYCE WALLACE, Trustee and KANSAS BANKERS ASSOCIATION, Amici Curiae.	)	

JUDGMENT
Entered June 7, 1990

Before BRORBY, Circuit Judge, BARRETT, Senior Circuit Judge and WEST,* District Judge.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

*The Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
By Patrick Fisher
Patrick Fisher,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	)	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee/Cross-Appellant,	)	Nos. 89-3029 89-3031
v.	)	
CURTIS REED JOHNSON, Appellant/Cross-Appellee,	)	

ORDER

Filed August 1, 1990

Before HOLLOWAY, Chief Judge, BARRETT, Senior Circuit Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges and WEST, * District Judge.

This matter comes on for consideration of appellant/cross-appellee's petition for rehearing with suggestion for rehearing en banc, filed in the captioned case.

*Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk
By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk